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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re HP Inkjet Printer Litigation

Case No. C-05-3580 JF (PVT)

CLASS ACTION

Theodore H. Frank, Kimberly Schratwieser,
and Adrian Monza,

**OBJECTION TO PROPOSED
SETTLEMENT**

Objectors.

Judge: Jeremy Fogel
Date: January 28, 2010
Time: 9:00 a.m.
Courtroom: 3 – Fifth Floor

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INTRODUCTION

The parties have proposed a \$5 million coupon settlement for a one-hundred-million-member class—providing at most five cents per class member. The vast majority of the class receives no meaningful relief: extrapolating from the data provided by class counsel on the rate of coupon claims to date, it appears that under 230,000 class members will even claim coupons, and a smaller number will redeem them. Class counsel have put their interest in recovering disproportionate attorneys' fees ahead of the interests of the members of a nationwide class. Class members Theodore H. Frank and Kimberly Schratwieser thus object to this settlement, which fails to meet the standards of Fed. R. Civ. Proc. 23(e) and 23(a)(4).

Class counsel negotiated a proposed settlement with Hewlett Packard that will require the proposed nationwide class to waive an extraordinarily broad array of claims related to their HP inkjet products (far broader than the claims at issue in this case) in exchange for essentially valueless coupons.

The plaintiffs attempt to hang their hat on prospective injunctive relief, but the parties make no effort to quantify it. Nor can they: the prospective relief is valueless as a matter of law because it does not compensate for past harms, and has no provision prohibiting HP from raising prices to extract any future consumer benefit.

In essence, the settlement provides only illusory benefits to the proposed class of 100 million members and at best serves as a marketing program for class members to continue doing business with HP. The settlement is thus inadequate, and should be rejected.

An independent reason to reject the settlement is the excessive attorneys' fees of \$2.9 million proposed for class counsel, more than twice the value of the coupons the proposed class is likely to receive. The clear sailing agreement contained in the proposed settlement (¶¶ 44-45) coupled with the excessive attorneys' fees demonstrate a violation of Fed. Rule of Civ. Proc. 23(a)(4) and 23(e)(2). Because class counsel have not acted adequately to protect the interests of the proposed class, and instead have put their

1 interests first in receiving fees of \$2.9 million, the settlement should be rejected. At a
2 minimum, the fee award should comply with 28 U.S.C. § 1712, and be tied to the value of
3 redeemed coupons.

4 These objections also serve as notice that counsel Theodore H. Frank intends to
5 appear at the January 28 fairness hearing on behalf of the Frank Objectors, and reserves
6 the right to cross-examine any witnesses presented in support of the settlement.

7 **ARGUMENT**

8 **I. The Objectors Are Members Of The Class.**

9 Theodore H. Frank (business address 1718 M Street NW, No. 236, Washington,
10 DC 20036 (703-203-3848)) received as a gift an HP Officejet Pro L7580 All-in-One on
11 August 3, 2008, Serial Number MY7A36303H. This is an “Affected Model” in the *Rich*
12 and *Biennis* classes. He received no notice of the settlement, and learned of the case and
13 his membership in the class when Ms. Schratwieser contacted him about filing an
14 objection. On November 24, 2010, Frank attempted to file a claim. It took Frank twenty
15 minutes to file a claim form for the *Rich* class for a \$2 e-credit; the settlement website
16 software would not provide him a claim form for the *Biennis* class because the website
17 script generating the form was incompatible with his Google Chrome browser. As of
18 December 30, 2010, Frank has received no response to his November 24, 2010 email to
19 the claims administrator regarding the *Biennis* claim; nor has the problem with the website
20 been fixed. Mr. Frank is unlikely to use his \$2 e-credit. *See* Declaration of Theodore H.
21 Frank (attached).

22 Kimberly Schratwieser (1318 N Poplar Avenue, Round Lake, IL 60073 (847-740-
23 8091)) purchased a HP Officejet Pro 8500 Premiere All-in-One Printer-A909n in 2009.
24 This is an “Affected Model” in the *Rich* and *Biennis* classes. Ms. Schratwieser has not
25 filed a claim because she finds it cheaper to purchase HP ink from Staples (where she
26 receives credits for recycling old ink cartridges) than from HP.com, and the e-credits will
27 be worthless to her.
28

1 The putative settlement class includes “all individual or entity end-users who
2 purchased or received as a gift in the United States an Affected Model from September 6,
3 2001, to September 1, 2010.” Settlement ¶ II.26. The objectors therefore have standing to
4 object. Fed. R. Civ. Proc. 23(e)(5).

5 The objectors are represented by the Center for Class Action Fairness, founded by
6 legal academic and attorney Theodore H. Frank in 2009. The Center is a non-profit
7 public-interest law firm that represents consumers *pro bono*. A number of “professional
8 objectors” are for-profit attorneys that attempt to or threaten to disrupt a settlement unless
9 plaintiffs’ attorneys buy them off with a share of the attorneys’ fees; thus, some courts
10 presume that the objector’s legal arguments are not made in good faith. But this is not the
11 business model of the Center for Class Action Fairness. While the Center focuses on
12 bringing objections to unfair class action settlements, it makes no effort to engage in *quid*
13 *pro quo* settlements to extort attorneys, and has never settled an objection. The Center
14 seeks attorneys’ fees only in cases where its objections have resulted in material pecuniary
15 gains for the class, and then only through court-ordered awards; because the Center is a
16 non-profit, tax law prohibits such fees from being the Center’s primary source of revenue.
17 Rev. Proc. 92-59, 1992-2 C.B. 411. The Center analyzes complaints from consumers
18 aggrieved by class action settlement notices to determine whether a settlement is
19 objectionable under the law because it favors attorneys over class members; as a non-
20 profit with limited resources, it must restrict itself to objecting only to the most
21 egregiously bad settlements. The Center’s litigation on behalf of consumers has been
22 covered by *Forbes*, the *National Law Journal*, and the *Wall Street Journal*, among others.
23 See, e.g., Rachel M. Zahorsky, “Unsettling Advocate,” *ABA Journal* (April 2010) (“‘What
24 Ted is doing is something very necessary: being there to protect classes from potentially
25 collusive settlements between businesses and lawyers,’ says Todd Zywicki, a George
26 Mason University law professor.”). The Center has previously represented class members
27 before this Court. *In re Apple Inc. Securities Litigation*, No. C-06-5208-JF (N.D. Cal.)
28

(parties modify preliminarily approved settlement to add \$2.5 million to \$14 million settlement fund in response to Center objection).

II. This Pre-Certification Settlement Merits High Scrutiny.

A “district court ha[s] a fiduciary responsibility to the silent class members.” *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987); *cf. also In re Washington Public Power Supply Sys. Lit.*, 19 F.3d 1291, 1302 (9th Cir. 1994). “Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole.” *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). “Both the class representative and the courts have a duty to protect the interests of absent class members.” *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). *See also Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) (“The district court must ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members”).

Where a court is confronted with a settlement-only class certification, the court must look to factors “designed to protect absentees.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). “Settlements that take place prior to formal class certification require a higher standard of fairness.” *Molski*, 318 F.3d at 953 (*quoting Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000)). *Accord Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1026 (9th Cir. 1998) (“Several Circuits have held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness ...[because of] the dangers of collusion between class counsel and defendant...when the settlement is not negotiated by a court-designated class representative....Because settlement class actions present unique due process concerns for absent class members we agree with our sister circuits...and adopt this standard as our own.”).

1 The settlement at issue is a pre-certification settlement: it resolves claims for a
 2 nationwide class that the court previously refused to certify. Per Ninth Circuit precedent,
 3 this Court has a special duty to make sure the settlement is more than fair to the absent
 4 proposed class of 100 million members.

5 **III. The “E-Credits” Are Coupons.**

6 Under the settlement, class members are entitled to “e-credits,” discounts of small
 7 amounts on products purchased at HP’s online store. The e-credits in this settlement can
 8 be used only once, Settlement ¶ 42(d), so if a class member has had multiple e-credits
 9 combined per ¶ 42(e) and does not use the full amount, he loses the remaining portion of
 10 the e-credit. The e-credit can only be used within six months of its issuance, cannot be
 11 used with other coupons (including other e-credits), and is only transferrable to members
 12 of a class member’s immediate family. *Id.* ¶ 42(a), (b), (c), (f). And according to the
 13 Notice of the Settlement, HP reserves to itself the right to determine on which products
 14 the e-credits may be used at some future date. Final Notice of Settlement at 5 (FAQ ¶ 9).

15 Although the proposed settlement carefully avoids calling these e-credits
 16 “coupons,” they share the central characteristic of all coupons: recipients must purchase
 17 another product in order to redeem value from the options. *Synfuel Technologies v. DHL*
 18 *Express (USA)*, 463 F.3d 646, 654 (7th Cir. 2006) (“a discount on a proposed purchase” is
 19 a coupon); *Fleury v. Richemont North Am., Inc.*, No. C-05-4525 EMC, 2008 WL
 20 3287154, at *2 (N.D. Cal. Aug. 6, 2008) (a coupon settlement is one where the relief
 21 constitutes “a discount on another product or service offered by the defendant in the
 22 lawsuit”). *Accord True v. American Honda Motor Co.*, No. CV 07-287, 2010 WL 707338
 23 at *11 (C.D. Cal. 2010) (Feb. 26, 2010); Christopher R. Leslie, *The Need to Study Coupon*
 24 *Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1396 (2005). The
 25 e-credits are not fungible like cash; they are indistinguishable from coupons. Indeed,
 26 ¶ 42(b) of the Settlement states that the e-credits cannot be used in conjunction with
 27 “other rebates or coupons”; the parties understood perfectly well that the e-credits were a
 28 type of coupon.

IV. The Coupon Settlement Is Problematic.

Under the Class Action Fairness Act, courts must give heightened scrutiny to coupon settlements. *Synfuel Technologies*, 463 F.3d at 654; *True v. American Honda*, 2010 WL 707338 at *12; *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1321 (S.D. Fla. 2007); *Kearns v. Ford Motor Co.*, No. CV 05-5644, 2005 WL 3967998, at *1 (N.D. Cal. Nov. 21, 2005).

Coupon settlements are problematic because: (1) they often do not provide meaningful compensation to class members; (2) they often fail to disgorge ill-gotten gains from the defendant; and (3) they often require class members to do future business with the defendant in order to receive compensation. *See Figueroa v. Sharper Image*, 517 F. Supp. 2d at 1302; *True*, 2010 WL 707338 at *12. As discussed below, these “e-credits” exhibit all three problems.

First, courts “have generally rejected the idea that the face value of coupons or rebates should be used for settlement valuation purposes.” *True*, 2010 WL 707338 at *17. “Compensation in kind is worth less than cash of the same nominal value.” *Id.* (quoting *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 390 (C.D. Cal. 2007) (quoting *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001))). *See also In re GMC Pick-Up Litig.*, 55 F.3d 768, 807 (3d Cir. 1995). “Where a coupon or rebate is not freely transferable on the open market, as is the case here, it has even less value.” *True*, 2010 WL 707338 at *17 (citing cases).

Redeemed coupons tend to be less valuable to shoppers than their face value. To illustrate this, imagine a case where a grocery shopper values a can a soup at \$1, but the soup is priced at \$1.20. The shopper normally would not buy the soup, and would perhaps buy other groceries instead. But with a 25-cent coupon, the shopper is willing to purchase the soup. Although the coupon has been used in the place of 25 cents cash, the shopper only values the coupon for the five-cent consumer surplus from purchase.

The problem is exacerbated because the e-credits are only available at the HP.com store, where claimants are at the mercy of whatever pricing HP happens to be offering at

1 the time a class member wants to redeem an e-credit. Depending on the vagaries of the
2 market, and on the pricing arrangements that Hewlett Packard have made with their
3 distributors, a class member can just as easily conduct a general internet search for a
4 product that he wants as going to HP's on-line store and checking the price offered. If the
5 price is lower elsewhere when the e-credit value is taken into account, then the class
6 member has gained no value from the e-credit since he will be better off purchasing
7 elsewhere. And because the e-credits expire after six months, she may not get the
8 opportunity to use her credit in an advantageous way. This is especially problematic in
9 this instance where Hewlett Packard will not reveal until some future point exactly which
10 products are eligible for e-credit redemption. Again, it appears that the value of the
11 unused e-credit will simply revert back to Hewlett Packard's balance sheet.

12 For example, objector Ms. Schratwieser would prefer to purchase HP ink from
13 Staples. Even before shipping costs, she receives a \$3 discount from Staples for recycling
14 her ink cartridges there that she could not receive from HP.com. Even if she were to go
15 through the trouble of making a claim for her \$8 e-credit (which may turn out to be
16 substantially less if enough class members make claims and the value of the e-credit is
17 reduced *pro rata*), when she purchases a single ink cartridge from HP.com, she will only
18 save \$5.00—and that assumes that she does not have to pay any additional shipping costs.
19 (HP.com is currently offering free shipping on ink “for a limited time.” If that limited
20 time ends before Ms. Schratwieser were to redeem her e-credit, her \$5 savings might be
21 exhausted by the shipping expense.) Objector Mr. Frank similarly finds his e-credit
22 worthless, because HP.com sells its ink for substantially more than competing vendors
23 such as Amazon.com. Frank Decl. ¶ 11 and Exhibit 2 and 3.

24 The problem is further exacerbated because the e-credits expire worthless after six
25 months. Not every class member who receives an e-credit will redeem their e-credit
26 within the six-month period. Coupon redemption rates are famously low. *See* 28 U.S.C.
27 § 1711 note § 2(a)(3)(A). The rule of thumb is that a redemption rate for a coupon
28 without a secondary market is between 1% and 3%. *See generally* James Tharn & Brian

1 Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443
2 (2005). One can expect the redemption rate of coupons actually claimed in this case to be
3 higher, because the only people receiving coupons are the class members who made
4 claims, but it is virtually guaranteed that class members will not receive \$5 million worth
5 of benefit from this settlement.

6 That said, even the claim rates are likely to be less than 1 percent. Given the time
7 and effort it takes to find a printer's serial number, fill out an electronic claim form, print
8 out a second claim form and submit a pdf of it, few class members will bother to file a
9 claim. The response rate will be further lowered because the claims administrator has put
10 in place barriers to making claims that will reduce the response rate, but increase the
11 expense of administering the settlement. Frank Decl. ¶¶ 8-10.

12 According to the Declaration of class counsel Niall P. McCarthy, "As of November
13 23, 2010, 82,500 claims have been received." (Docket No. 253 at ¶ 6.) The Court granted
14 the parties Motion for Preliminary Approval of Settlement on October 1, 2010. At the
15 current rate of under 1600 claims a day (assuming that all the claims are adjudged as
16 valid), there will be under 230,000 claims by the February 15, 2011, deadline for class
17 members to claim recovery under the proposed settlement. Generously assuming a five-
18 dollar average claim (some class members such as Mr. Frank will receive only a \$2
19 coupon), that implies that under \$1.2 million in claims will be made on the coupon fund.
20 (Though the alleged fraud relates to the purchase of ink cartridges, class membership is
21 determined by the ownership of printers; a class member who was allegedly defrauded
22 dozens of times is entitled to the same pittance of relief under the settlement as one who
23 was allegedly defrauded once.)

Thus, most of the hundred-million class members¹ will receive nothing under this settlement. The briefing seeking preliminary approval and the class notice failed to disclose the size of the class: in Plaintiffs' Motion for Consolidation of Cases for Settlement Purposes and Preliminary Approval of Class Action Settlement, class counsel stated only that "[t]he proposed class meets the requirement of numerosity, in that it is comprised of over one million members." Docket No. 252 at 18. While no one disputes numerosity, a settlement that provides an average of \$5 of coupons to members of the class is a considerably different beast than one that provides an average of \$0.05 of coupons to members of the class. This settlement would have generated additional objections (and might not have received preliminary approval) if the court and the class knew without digging deep within the docket that the average class member would receive five cents. The settling parties have submitted no expert evidence claiming that the redemption rate will be unusually high in this case, or even high enough to redeem anywhere near \$5 million of coupons. *Cf.* 28 U.S.C. § 1712(d).

Second, the coupon settlement works out to be a source of profit for HP. Because the e-credit can only be redeemed at the HP.com on-line store, HP realizes profits from vertical integration that it would not realize if a consumer instead purchased HP products from Staples. Even with the discount from the e-credit coupon, HP almost certainly receives more revenue when a consumer purchases ink cartridges from HP.com than when HP sells the same ink cartridges at a wholesale price to Staples for resale. The effect of the coupon is to drive profitable business to HP.com's vertically-integrated retail operation—and that is before one considers the benefits to HP.com marketing from

¹ Cameron R. Azari, the Director of Epiq Legal Noticing, states, "While developing the Notice Plan, it was determined that HP has email addresses for a portion of the class. I understand that this partial list of Class member names and email addresses comprises approximately 13,500,000 (or approximately 13.5% of the class in terms of units)." (Docket No. 254 at ¶ 5.) If 13.5 million inkjet printers sold constitute approximately 13.5 percent of the class, then the class size is approximately 100 million.

1 signing up (and receiving marketing information from) class-member consumers who had
 2 not previously shopped at HP.com. Class members may purchase from HP.com “because
 3 they fe[el] beholden to use the [e-credits],” not because they would have otherwise. *In re*
 4 *GMC Pick-Up Litig.*, 55 F.3d at 808; *True*, 2010 WL 707338 at *18. This can be a
 5 “tremendous sales bonanza” to HP. *True*, 2010 WL 707338 at *18 (*quoting In re GMC*
 6 *Pick-Up Litig.*, 55 F.3d at 808 (*quoting Bloyed v. General Motors Corp.*, 881 S.W.2d 422,
 7 431 (Tex. Ct. App. 1994))).

8 The third *Figueroa* problem obviously applies here: consumers have to do further
 9 business with HP to receive the benefits of the settlement, because the e-credits are not
 10 fungible and are only redeemable at HP.com. This does a class member who no longer
 11 owns an HP printer any good, not least because such a class member is unable to make a
 12 claim if they did not retain the serial number of her printer.

13 **V. The “Injunctive Relief” Is Worthless To The Class As A Matter Of Law.**

14 This is a damages-driven case. The plaintiffs’ claim that the “primary objective” of
 15 the suits was injunctive relief (Docket No. 261 at 11) was already rejected by this Court
 16 when it denied Rule 23(b)(2) certification. Docket No. 170 at 9.

17 However, even if the plaintiffs could make a claim that this proposed class
 18 settlement’s prospective injunctive relief was the suit’s “primary objective,” the relief
 19 provided by the injunctive portion of the settlement is illusory and does not render fair,
 20 reasonable, and adequate what has been seen above as a deficient coupon settlement. “The
 21 fairness of the settlement must be evaluated primarily based on how it compensates class
 22 members for these past injuries.” *Synfuel*, 463 F.3d at 654. In this case, only the coupon
 23 portion of the settlement could compensate for past injury by the class members, not the
 24 injunctive relief.

25 According to the parties, if the proposed settlement is approved, Hewlett Packard
 26 will agree to discontinue the use of certain pop-up messaging and to make certain changes
 27 to its disclosures.

1 The going-forward nature of this alleged injunctive relief provides no compensation
2 for *past* harm. At best, such “relief” is an agreement to avoid in the future the alleged
3 harm that class members have complained of. “No changes to future advertising by [HP]
4 will benefit those who already were misled.” *True*, 2010 WL 707338 at *19. *Accord*
5 *Synfuel*, 463 F.3d at 654 (“It is future customers who are not plaintiffs in this suit who will
6 reap most of the benefit from these changes.”).

7 Imagine a class member who no longer owns an HP printer. How much value
8 would HP’s disclosures in the future about printing practice be worth to him? Nothing.

9 Notably, when courts have approved injunction-only settlements, there were
10 material benefits to class members that this settlement does not have. For example, in
11 *Hanlon v. Chrysler Corp.*, the parties agreed to a settlement whereby Chrysler would
12 provide “a redesigned improved replacement latch to be installed free of charge.” 150
13 F.3d 1011, 1018 (9th Cir. 1998).

14 There is a critical difference between the *Hanlon* class and the class here. In
15 *Hanlon*, class members **owned** Chrysler minivans, a tangible good. Thus, the prospective
16 relief, provided free of charge, improved the lot of the class members: before, they owned
17 a defective vehicle that they had allegedly paid too much for; afterwards, they owned a
18 fixed vehicle.

19 The prospective relief here, however, is completely different. This is a lawsuit over
20 ink that has already been used by class members. The class members have already paid
21 for and fully consumed the ink in the past. Any improved knowledge about how to use
22 HP printers and ink cartridges created by the prospective injunctive relief would not be
23 provided “free of charge” as in *Hanlon*, but would be useful only if a class member
24 purchased ink or printers from HP in the future. The class member will need to **spend**
25 money to make the injunctive relief valuable to him.

26 Moreover, these disclosures being blazoned as “injunctive relief” would be made
27 by any prudent business looking to avoid further lawsuits regarding its business practices.
28

1 The parties have submitted no evidence as to the value of the injunctive relief
 2 included in the proposed settlement. Nor can they. Even for class members that plan to
 3 continue using HP printers and ink, the injunctive relief is only of value if HP voluntarily
 4 chooses not to raise its prices to fully reflect the additional expense of changing its
 5 business practices. Nothing in the settlement addresses HP's future pricing, and there is no
 6 reason to believe that HP will give consumers something for nothing when it is not
 7 required to.

8 The objectors are not claiming that injunctive relief is never appropriate in a class
 9 action settlement: they are simply claiming that the injunctive relief must *benefit* the class,
 10 as it did in *Hanlon*. Here, the injunctive relief does no such thing. As such, the injunctive
 11 relief is irrelevant to the proposed nationwide class at issue in this proposed settlement, as
 12 well as valueless to that class.

13 **VI. The Settlement Cannot Be Approved Because Neither The Parties Nor The**
 14 **Class Notice Have Disclosed The Effect Of The Waiver.**

15 The release that Hewlett Packard is asking proposed class members to make in
 16 exchange for the “benefits” class members will receive is extraordinarily broad—far
 17 broader than the claims brought in this lawsuit. Settlement ¶ 21.

18 It is noteworthy that the parties have failed to disclose whether there are other class
 19 actions with other legal theories pending at this time that will be extinguished by the
 20 settlement. If such lawsuits are ongoing, HP should disclose those to the court, and the
 21 parties should give the court a fair valuation of the merits of those pending class actions.
 22 The district court has the duty to estimate the litigation value of the claims of the class and
 23 determine whether the settlement is a reasonable approximation of that value. *Mirfasihi v.*
 24 *Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004); *Reynolds v. Beneficial Nat'l Bank*,
 25 288 F.3d 277, 284-85 (7th Cir. 2002); *see also In re General Motors Corp. Pick-Up Truck*
 26 *Fuel Tank Products Liability Litigation*, 55 F.3d at 806.

27 As this Court has already found, there are a multiplicity of possible suits against
 28 Hewlett Packard that could be brought by distinct classes representing each of the

1 individual states. Docket No. 170 (Order Denying Summary Judgment) at 11 (*citing In re*
2 *Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997)
3 (“Each plaintiff’s home state has an interest in protecting its consumers from in-state
4 injuries caused by foreign corporations and in delineating the scope of recovery for its
5 citizens under its own laws.”)).

6 As Judge Posner recently wrote, “The judge who presides over a class action and
7 must approve any settlement is charged with responsibility for preventing the class
8 lawyers from selling out the class, but it is a responsibility difficult to discharge when the
9 judge confronts a phalanx of colluding counsel. The defendant wants to minimize outflow
10 of expenditures and the class counsel wants to increase inflow of attorneys’ fees. Both can
11 achieve their goals if they collude to sacrifice the interests of the class.” *Thorogood v.*
12 *Sears Roebuck & Co.*, No. 10-2407, 2010 WL 4283637 (7th Cir. Nov. 2, 2010) (internal
13 citation omitted).

14 For this Court to allow Class Counsel and Hewlett Packard to mandate that 100
15 million class members waive a multiplicity of claims that can only be speculated about at
16 this time, and that might garner the interest not only of other claimants, but state
17 governments as well, would be impermissible. The parties have not performed the
18 required analysis to inform class members or the court of the fair value of the pending
19 claims. Perhaps there are no such other class actions, or perhaps any other pending class
20 actions are meritless, in which case this particular part of the objection is moot (though it
21 remains curious why the release is so much broader than the complaint). But that is within
22 the knowledge of the parties, and they have not met their burden to make that showing.
23 Until they do, the parties have not met the burden of demonstrating that the settlement is
24 fair, reasonable, or adequate under Fed. R. Civ. Proc. 23(e)(2), and have not met the
25 requirement of providing the “best notice practicable.” Fed. R. Civ. Proc. 23(c)(2), (e)(1).

VII. The Fee Request And The “Clear Sailing” Provision Suggest A Failure To Meet Rule 23(a)(4).

Class counsel are requesting \$2.9 million in fees for a settlement that is likely to provide only about \$1 million in benefit to the class. This is exactly backwards.

A court should give a settlement “special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement.” *Hanlon*, 150 F.3d at 1021 (9th Cir. 1998). The problem is exacerbated here because of the “clear sailing” arrangement in the settlement: putting their own fees ahead of the interests of the class, class counsel negotiated a provision protecting their fees from challenge by the defendant. Settlement ¶ 44. Such a provision invites additional scrutiny of the settlement. *Weinberger v. Great Northern Nekoosa Corp.*, 925 F. 2d 518, 524 (1st Cir. 1991); *cf. also Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 961 n. 5 (9th Cir. 2009). After all, such a concession from the defendant to benefit the class counsel almost certainly comes at the expense of the class. “If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained.” *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

This is a fee-driven settlement: the attorneys are requesting fees at least double the amount they are likely to recover for the class. It is unclear whether the lack of recovery for class members is because class counsel tacitly colluded with the defendant or because class counsel simply recklessly disregarded their obligation to negotiate a settlement that was likely to provide meaningful recovery to their clients. But in either situation, the attorneys have failed to meet the standard of Fed. R. Civ. Proc. 23(a)(4), and the settlement fails to meet the standard of Fed. R. Civ. Proc. 23(e).

VIII. The Fee Request Is Excessive Under 28 U.S.C. § 1712(a).

Because this is a coupon settlement where the injunctive relief is valueless to the class, attorneys’ fees “shall be based on the value to class members of the coupons that are

redeemed” rather than the theoretical value of the coupons available for redemption. 28 U.S.C. §1712(a). Even if all \$5 million in coupons were redeemed, the \$2.9 million fee request—58% of class recovery—would be excessive. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (appropriate benchmark for fees is 25% of recovery). Because the redemption rate will be below \$5 million, the fee award should be even lower.

“The lodestar amount is particularly inappropriate where, as here, the benefit achieved for the class is small and the lodestar award large.” *True*, 2010 WL 707338, citing *Create-A-Card, Inc. v. Intuit, Inc.*, No. C 07-06452 WHA, 2009 WL 3073920 (N.D. Cal. Sept. 22, 2009). Attorneys’ fees should be based on a percentage of the recovery. “The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest-alignment device is not perfect. . . . But [an] imperfect alignment of interests is better than a conflict of interests, which hourly fees may create.” *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986). *See generally* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 TULANE L. REV. 1809 (2000) (citing authorities that show a “broad consensus that percentage-based formulas harmonize the interests of agents and principals better than time-based formulas like the lodestar approach.”). The percentage method “directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). In contrast, the “lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits.” *Id.* Both public policy and the clear language of § 1712(a) require fees to be based on actual class recovery.

In the pending case of *In re Classmates.com Consolidated Litig.*, No. C 09-45 RAJ (W.D. Wash.) (\$1.05 million fee request for \$117,000 pecuniary recovery from a fictional \$9.5 million “fund”), the very same class counsel in this case argued that *Boeing Co. v.*

1 *Van Gemert*, 444 U.S. 472 (1980) and *Williams v. MGM-Pathe Communications Co.*, 129
 2 F.3d 1026 (9th Cir. 1997) require a district court to base fees on the total amount available
 3 to the class.² This is incorrect. *First*, both of these decisions were superseded by
 4 intervening changes in the law. *See* Notes of Advisory Committee on 2003 Amendments
 5 to Rule 23(h) (fee award should not exceed a “reasonable percentage of the amount of any
 6 damages and prejudgment interest **actually paid** to the class” (emphasis added)) (*citing* 15
 7 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6)). Because the settlement involved “coupons” for
 8 future Classmates.com memberships, the Class Action Fairness Act requires fees to be
 9 based on actual class recovery: attorneys’ fees “shall be based on the value to class
 10 members of the coupons that are redeemed” rather than the theoretical value of the
 11 coupons available for redemption. 28 U.S.C. § 1712(a). *See also* Federal Judicial Center,
 12 *Manual for Complex Litigation (Fourth)* § 21.71 (2004) (“the fee awards should be based
 13 only on the benefits actually delivered”); 28 U.S.C. § 1711 note § 2(a)(3)(A) (Congress
 14 enacted Class Action Fairness Act out of concern over abuses of the class action device
 15 that “harmed” class members, “such as where ... counsel are awarded large fees, while
 16 leaving class members with coupons **or other awards of little or no value.**” (emphasis
 17 added)). *Second*, both *Boeing* and *Williams* are inapplicable to this case because they only
 18 apply to cases where there is a *common fund*. There is no common fund here: if class
 19 members do not redeem \$5 million worth of coupons, the remainder reverts to HP. *Strong*

20
 21 ² As *Classmates.com* helps demonstrate, class counsel in this case, Kabateck Brown
 22 Kellner, has a pattern and practice of questionable settlements that benefit the attorneys at
 23 the expense of the class; a number of these settlements have drawn scrutiny from the
 24 popular press. *See* Gregg Easterbrook, “Should game outcomes be reversed?”, ESPN.com
 25 (Aug. 17, 2010) (describing *Classmates.com* settlement as “Lawsuit of the Year” for
 26 “taking the cake” in “shafting the plaintiffs”); Nathan Koppel, *Proposed Facebook*
 27 *Settlement Comes Under Fire*, WALL ST. J. (Mar. 2, 2010) (examining Kabateck Brown
 28 Kellner \$0 settlement in *Nachsin v. AOL* (pending in the Ninth Circuit in Docket No. 10-
 55129)). The settlement at bar is parallel to a similarly attorney-friendly coupon
 settlement involving HP and Kabateck Brown Kellner, *In re HP Laserjet Printer*
Litigation, Case No. CV 07-0667 AG (C.D. Cal.).

1 *v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 852-53 (5th Cir. 1998); *Create-A-*
 2 *Card*, 2009 WL 3073920. Thus, the *Boeing* rule and *Williams* rule, already nonsensical
 3 public policy, would not apply even if they were still good law.

4 In the event that the court approves the settlement notwithstanding all of its
 5 problems, the fee request should be limited to 25% of the value of the redeemed coupons.

6 **IX. The Court Should Discount Attempts By The Settling Parties To Infer Class**
 7 **Approval From A Low Number Of Objections.**

8 In any given consumer class action settlement, no matter how egregiously bad for
 9 the class, only a small percentage of class members will object. The natural predominant
 10 response is apathy, because objectors—unless they can obtain *pro bono* counsel—must
 11 spend time and effort, and perhaps money on counsel, to attempt to improve the
 12 settlement for millions of fellow class members with little potential gain for themselves
 13 over a settlement that is worth only a few dollars in coupons. One can expect class
 14 counsel to argue that this natural tendency to free-ride is acquiescence or evidence of
 15 support for the settlement. This is wrong. Silence is simply *not* consent:

16 There may be many reasons why class members in this case didn't register
 17 their concerns about the settlement: lack of interest, time, information, etc.
 18 Like the Third Circuit in the *General Motors* case, the Court is unwilling to
 19 automatically equate class silence with a showing of “overwhelming” support
 20 for the settlement. Therefore, the fact that statistically few people bothered to
 opt-out or file an objection ultimately counts little in the Court's overall
 fairness analysis.

21 *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001), *citing In re*
 22 *GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 789 (3d Cir. 1995).
 23 “Silence may be a function of ignorance about the settlement terms or may reflect an
 24 insufficient amount of time to object. But most likely, silence is a rational response to any
 25 proposed settlement even if that settlement is inadequate. For individual class members,
 26 objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for
 27 individual class members are often low.” Christopher R. Leslie, *The Significance of*
 28

1 *Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73
2 (2007).

3 There is usually little hope that opt-outs can recover for their claims—the entire
4 purpose of class actions is to aggregate claims that would be uneconomical to bring
5 individually. “Almost by definition, most class members have too little at stake to
6 warrant opting out of the class litigation and filing an individual lawsuit. Thus, opting out
7 is probably not a viable option even though a proposed settlement is unfair or inadequate.”
8 Leslie, *supra*, 59 FLA. L. REV. at 109. Without *pro bono* counsel to look out for the
9 interests of the class, filing an objection is economically irrational for any individual.

10 “[A] combination of observations about the practical realities of class actions has
11 led a number of courts to be considerably more cautious about inferring support from a
12 small number of objectors to a sophisticated settlement.” *In re GMC Pick-Up Litig.*, 55
13 F.3d at 812, *citing In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th
14 Cir. 1981); *cf. Petruzzi’s, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 297 (M.D. Pa.
15 1995) (“[T]he silence of the overwhelming majority does not necessarily indicate that the
16 class as a whole supports the proposed settlement”). “[A] low number of objectors
17 is almost guaranteed by an opt-out regime, especially one in which the putative class
18 members receive notice of the action and notice of the settlement offer simultaneously.”
19 *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 446 (W.D. Pa. 2007). “[W]here
20 notice of the class action is, again as in this case, sent simultaneously with the notice of
21 the settlement itself, the class members are presented with what looks like a *fait*
22 *accompli*.” *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d
23 677, 680-681 (7th Cir. 1987). “Acquiescence to a bad deal is something quite different
24 than affirmative support.” *In re General Motors Corp. Engine Interchange Litigation*,
25 594 F.2d 1106, 1137 (7th Cir. 1979) (reversing approval of settlement).

26 When class members have little at stake, as in a consumer fraud class action such as
27 this where the maximum recovery was a few dollars in coupons, the rate of response is
28 famously low. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and*

1 *Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV.
2 1529, 1532 (2004).

3 As such, the Court should draw the adverse inference that a majority of the class
4 objects to the settlement. *Cf. also In re GMC Pick-Up Litig.*, 55 F.3d at 813 (finding that
5 “class reaction factor” does not weigh in favor of approval, even when low number of
6 objectors in large class, when “those who did object did so quite vociferously”).

7 The judge must act as a guardian for *all* class members—whether or not they have
8 jumped through the hoops of formally objecting. “[T]he absence or silence of class
9 parties does not relieve the judge of his duty and, in fact, adds to his responsibility.”
10 *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373,
11 375 (D. Kan. 1971). The settlement’s proponents have the burden to show the proposed
12 settlement and the proposed fee award is fundamentally fair, adequate, and reasonable,
13 and class counsel have simply not carried this burden.

CONCLUSION

Calling coupons “e-credits” does not protect a settlement from the scrutiny required of a coupon settlement. This settlement is a coupon settlement that provides a maximum average benefit of five cents per class member, and suffers from all of the problems that lead courts to criticize coupon settlements. Nor can the prospective injunctive relief compensate for the lack of meaningful class benefit for alleged harms in the past and a waiver of claims that go far beyond those made in the complaint. The settlement is a fee-driven settlement for the benefit of class counsel, and must be rejected under Rules 23(a)(4) and 23(e).

If the settlement is nevertheless approved, any fee award must comply with 28 U.S.C. § 1712(a), and be based on the actual redemption rate of coupons; as such, the \$2.9 million fee request is exorbitantly excessive.

Dated: December 30, 2010

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank

**CENTER FOR CLASS ACTION
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PROOF OF SERVICE

I declare that:

I am employed in the District of Columbia. I am over the age of 18 years; my office mailing address is 1718 M Street NW, No. 236, Washington, DC 20036.

On December 30, 2010, I served the attached:

OBJECTION TO PROPOSED SETTLEMENT

X By electronic mail in that I e-mailed a PDF of this brief to the following attorneys.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 30, 2010.

/s/ Theodore H. Frank
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